Supreme Court, U. S.
FILED
MAY 18 1980
MICHAEL RODAK, JR., CLERK

No. 79-6290

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

GLEN D. DUPRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. "A" 1-51) is reported at 612 F.2d 319. The opinion of the district court (Pet. App. "B" 1-84) is reported at 453 F. Supp. 1171.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1979, and a petition for rehearing was dismissed on January 18, 1980.[1] A second petition for rehearing was filed on March 24, 1980. On April 14, 1980, the court of appeals vacated its January 18 dismissal order and denied the second petition for rehearing. The petition for a writ of certiorari was filed on March 20, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

1/ The procedural history of this case is somewhat unusual. On January 18, 1980, the court of appeals dismissed the petition for rehearing after having been apprised of a letter dated December 12, 1979, in which petitioner apparently instructed his counsel not to file a petition for rehearing. On January 24, 1980, petitioner's counsel moved to vacate the dismissal. That motion was denied on February 11, 1980. Thereafter, on March 17, 1980, the district court held an evidentiary hearing to inquire into the circumstances surrounding petitioner's apparent withdrawal of the petition for rehearing and concluded that that withdrawal had not been petitioner's "free, voluntary and intelligent act." In light of the district court's findings, a second petition for rehearing was filed on March 24, 1980. On April 14, 1980, the court of appeals recalled its mandate, vacated its order of January 18, 1980, and denied the second petition for rehearing. In the interim, petitioner had moved, on February 19, 1980, for an extension of time in which to file his petition for a writ of certiorari. On February 21, 1980, Mr. Justice Blackmun extended the time for petitioning until March 20, 1980, "without prejudice to the Court's consideration of whether [the] application [had] been filed on time."

QUESTION PRESENTED

Whether the western portion of the Cheyenne River Indian Reservation, opened up to entry in 1908, remains "Indian Country" for purposes of a federal prosecution under the Major Crimes Act.

STATUTES INVOLVED

The Act of May 29, 1908, 35 Stat. 460, is reproduced at Pet. App. "C" 1-5. The Act of February 17, 1910, 36 Stat. 196 is reproduced at Pet. App. "C" 6-7.

STATEMENT

On June 1, 1977, petitioner Glen D. Dupris, a Sioux Indian, was charged in the United States District Court for the District of South Dakota with burglary and larceny at a retail store in Eagle Butte, South Dakota, in violation of the Major Crimes Act, 18 U.S.C. 1153, which provides for exclusive federal jurisdiction over certain crimes committed by Indians in "Indian country."[2] See United States v. John, 437 U.S. 634 (1978).

2/ 18 U.S.C. 1153 provides in relevant part:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely * * * burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States. * * *

(Footnote continued on next page)

On October 5, 1977, petitioner moved to dismiss the information on the ground that Eagle Butte was not "Indian country."

It is undisputed that Eagle Butte lies within the original boundaries that were established for the Cheyenne River Reservation in 1889.[3/] In 1908, Congress opened up the western portion of this reservation, including Eagle Butte, for white settlement. Act of May 29, 1908, 35 Stat. 460. The 1908 Act is one of numerous statutes that Congress enacted after the turn of the century, all of which had the purpose of opening up surplus Indian lands for white settlement. To that end, however, various means were adopted, and it is common ground that "[s]ome surplus land statutes have operated to disestablish or diminish

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(Footnote continued from preceding page)
18 U.S.C. 1151 provides:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinquished, including rights-of-way running through the same.

3/ The Great Sioux Reservation, which encompassed twenty-five million acres, was established by the Treaty of April 29, 1868, 15 Stat. 635. In 1877, Congress severed 7.5 million acres in the Black Hills region. Act of February 28, 1877, 19 Stat. 254. See United States v. Sioux Nation, No. 79-639 (argued March 24, 1980). In 1889, the Sioux ceded an additional eleven million acres, and the remaining reservation area was subdivided into six separate reservations, one of which was the Cheyenne River Reservation. Act of March 2, 1889, 25 Stat. 888.

the size of the reservations, while others have left unaffected the reservation boundaries." United States v. Long Elk, 565 F.2d 1032, 1035 (8th Cir. 1977) (footnotes omitted). The question here is whether the 1908 Act was one of those that had the effect of "disestablishing" a portion of the reservation.

On June 29, 1978, the district court so held and accordingly granted petitioner's motion to dismiss (Pet. App. "B"). The government appealed and the Eighth Circuit reversed, with one judge dissenting. That court examined the language of the 1908 Act, as well as its history and surrounding circumstances, and concluded that federal jurisdiction had been properly invoked because the relevant materials did not demonstrate a clear disestablishment intent (Pet. App. "A").

ARGUMENT

At the outset, we note that there is no longer a truly live controversy between the parties. The issue sought to be presented has no practical consequence for petitioner because, on May 2, 1980, the United States Attorney for the District of South Dakota moved to dismiss, with prejudice, all pending charges against petitioner. Notwithstanding the action of the United States Attorney, petitioner has declined to withdraw the present petition and the district court has declined to rule on the government's motion pending this Court's action on the petition. See Fed.R.Crim.P. 48(a).[4/] Accordingly, although

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4/ Although the United States Attorney intended that the dismissal should be with prejudice, his May 2 motion omitted to so provide in terms. Consequently, an amended motion was filed

(Footnote continued on next page)

the case is not moot, as a technical matter, we submit that this Court ought not entertain on the merits a petition for certiorari to review a decision that cannot adversely affect the applicant.

In any event, the petition is without merit. The contention is that the Eighth Circuit's holding is inconsistent with this Court's decisions in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), and DeCoteau v. District County Court, 420 U.S. 425 (1975). But, obviously, a difference in result does not necessarily demonstrate a conflict. Given the diversity of statutory formulations that Congress has used to open up Indian lands, the question can always be raised whether the relevant statute has disestablished or diminished a particular reservation or simply opened it to settlement. In each case, that question is essentially fact-bound; it can be answered only be reference to the language and circumstances of a particular Act. Accordingly, this Court has developed principles of statutory construction to establish uniformity in this complex area. See Rosebud Sioux Tribe v. Kneip, supra; DeCoteau v. District County Court, supra; Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Superintendent, 368 U.S. 351 (1962). In this case--as in Rosebud itself--the

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on May 6, 1980, which motion asks that the information be dismissed "with prejudice on the grounds and for the reasons that nearly three years have elapsed since this suit was filed. Significant items of evidence have been lost or misplaced during that time, witnesses' memories have faded in the interim, and, therefore, the interests of justice will be best served by dismissing said Information." A copy of the government's motion is attached hereto as "Appendix A." The United States Attorney having re-evaluated his case and having determined that petitioner's prosecution is no longer viable, it is hardly conceivable that the government's motion should not be granted in due course. See United States v. Cowan, 524 F.2d 504 (5th Cir. 1975), cert. denied, 425 U.S. 971 (1976).

Eighth Circuit properly applied those principles,[5/] and petitioner's claim warrants no further review.

1. Whether a reservation has been disestablished in whole or in part depends upon congressional intent. The mere fact that lands have been opened for settlement "does not necessarily mean that the opened area has lost its reservation status." Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 586-587. Accord Mattz v. Arnett, supra, 412 U.S. at 496; Seymour v. Superintendent, supra, 368 U.S. at 356. Disestablishment will be found only if such an intent is clear on the face of the statute or from surrounding circumstances and legislative history (Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 586; Mattz v. Arnett, supra, 412 U.S. at 505), and any ambiguity must be resolved against disestablishment. McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 174 (1973). The court below applied that test and concluded that "[h]ere a congressional intent to diminish Indian land, rather than to merely open it to settlement, is not clear. In fact, the opposite conclusion is as easily reached" (Pet. App. "A" 6).

5/ Petitioner apparently attributes some significance to the fact that the Court has found disestablishment in the last two cases in which it has considered the issue (see Rosebud Sioux Tribe v. Kneip, supra; DeCoteau v. County District Court, supra). In Rosebud and DeCoteau, however, this Court expressed no intention to overrule its earlier decisions. Nor do the cited cases cast any shadow on the Eighth Circuit's decision in United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973), which was approved in Mattz v. Arnett, supra, 412 U.S. at 505 n.23, and which decided the precise issue presented in this case. See also United States v. Long Elk, supra, 565 F.2d at 1036 n.10.

The court of appeals first examined the language of the 1908 Act and properly concluded that "no congressional determination to terminate is expressed in the statute which opened the lands in and around Eagle Butte" (Pet. App. "A" 5).[6/] Consistent with this Court's prior decisions, the court of

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6/ In DeCoteau v. District County Court, supra, 420 U.S. at 445, this Court noted that certain language is "precisely suited to [the] purpose [of disestablishment]." That language, which generally speaks in terms of "cession," does not appear in the 1908 Act. Only two provisions of the 1908 Act provide any arguable suggestion of disestablishment intent.

First, Section 7 of the Act sets aside two sections of each township for common school purposes. In affirming the Eighth Circuit's decision in Rosebud, this Court noted that a similar provision supplied some indication of disestablishment intent. Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 599-601. In Rosebud, however, the Court had previously found that the reservation had been disestablished by a 1901 Act, and its inquiry with respect to the school lands provision was made in the context of determining whether a 1904 Act, which contained the school lands provision, demonstrated a contrary intent. That is not the situation here. Moreover, the rationale for the school lands provision in the 1908 Act is obvious. Once the reservation was opened, schools would have to be provided for white children, regardless whether the reservation was to be disestablished. That Congress provided for that need in the same manner that it had previously used in a more general context demonstrates only that it chose to follow a previously tested method. The court of appeals considered that factor in its proper perspective: "Certainly, some weight should be given to the school argument, but there was a similar provision in the act considered in Long Elk and we held that it was of minimal importance in light of the entire record" (Pet. App. "A" 8).

Second, Section 8 of the Act, as amended in 1910, bans the use of intoxicants within the opened area. But that is very weak evidence of disestablishment intent. In 1910, the Indians specifically requested the addition of this provision, which made federal liquor laws applicable to all reservation lands held by non-Indians, "whether those lands were opened to settlement by the 1908 Act or not" (Pet. App. "A" 8). Obviously, this at least partially redundant provision is ambiguous.

The 1908 Act also contains two minor transitional provisions that are even less persuasive. Section 2 allowed Indians to relinquish allotments in the opened area in exchange for new allotments within "the reservation, thus diminished," and Section 9 provided that Indians residing upon allotments in specified townships would have the right to use timber there "only so long as the lands remain part of the public domain." In the absence of express disestablishment or cession language, these references may create some ambiguity, but they evince no clear disestablishment intent.

appeals proceeded to consider the legislative history and surrounding circumstances.

The Eighth Circuit found that the legislative history of the 1908 Act was also inconclusive (Pet. App. "A" 8). There are ambiguous references to both "cession" and "opening." See, e.g., S. Rep. No. 439, 60th Cong., 1st Sess. (1908) (parts 1 and 2) and H.R. Rep. No. 1539, 60th Cong., 1st Sess. (1908)).[7/] Moreover, the court properly concluded, as it had in United States ex rel. Condon v. Erickson, 478 F.2d 684, 688 (8th Cir. 1973), that "the subsequent Congressional treatment of the reservation has been inconsistent." Shortly after passage of the 1908 Act, Congress had occassion to refer to the opened lands. On some occasions, Congress referred to them as the "Cheyenne River Reservation;" on other occasions, language indicative of disestablishment was used. See Act of June 23, 1910, 36 Stat. 602; Act of May 28, 1914, 38 Stat. 384; Act of March 4, 1921, 41 Stat. 1446-1447. See also H.R. Rep. No. 1046, 61st Cong., 2d Sess. 1 (1910); S. Rep. No. 723, 61st Cong., 2d Sess. 1 (1910); 45 Cong. Rec. 5799-5810 (1910).[8/]

So, also, the court of appeals found no clear indication of disestablishment intent in the surrounding circumstances. Unlike the presidential proclamation opening up the Rosebud reservation (Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 602-603), which clearly stated an intent to disestablish, the presidential proclamation that opened the Cheyenne River Reservation simply provided that "all nonmineral, unallotted, unreserved lands within the Cheyenne River * * * Reservation[] * * * shall be disposed of * * * and be opened to settlement

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7/ Moreover, the "cession" language in the legislative history is generally attributable only to the agent who "negotiated" with the Indians and to the South Dakota legislators who sought the opening up of this territory. There is no indication that those views were shared by the Congress as a whole (See Pet. App. "A" 5-6).

8/ Administrative references to the opened area have also been inconsistent (see Pet. App. "A" 42-43 (McMillian, J., dissenting)).

and entry * * *" (Proclamation of August 19, 1909, 36 Stat. 2500). Nor was there, in this instance, an agreement between the government and the Indians concerning disestablishment. Compare Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 598 n.20; United States v. Long Elk, supra, 565 F.2d at 1039. And, finally, the subsequent jurisdictional treatment of the area does not clearly show disestablishment.[9/] As the court of appeals pointedly observed here, the subsequent jurisdictional history provides little assistance (Pet. App. "A" at 9):

> In our view, [the] history can be read in about any way the reader likes. Simply stated, South Dakota has, at times, asserted criminal jurisdiction over this and other reservations and, at times, it has not.

In short, the court of appeals carefully followed the principles established in this Court's prior decisions. Petitioner's claim warrants no further review.

2. The State of South Dakota and certain of its political subdivisions have filed a brief amicus curiae urging that the petition be granted. In addition to the arguments set forth in the petition, they note that the Eighth Circuit's decision apparently conflicts with the South Dakota Supreme Court's decision in Stankey v. Waddell, 88 S.D. 104, 256 N.W.2d 117 (1977). While Stankey does indeed construe the Act of 1908 as having disestablished a part of the Cheyenne River Reservation, it is far from clear that this conflict will survive the present

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9/ In Rosebud, this Court relied upon the fact that "the State [had] exercised unquestioned jurisdiction over the disputed area since the passage of the enactment--an indication of the intended purpose of the Act that was not present in Mattz v. Arnett, 412 U.S., at 505." Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 598-599 n.20. Accord DeCoteau v. County District Court, supra, 420 U.S. at 442. Compare United States v. Long Elk, supra, 565 F.2d at 1039; United States ex rel. Cook v. Parkinson, 525 F.2d 120, 122 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977).

ruling. Indeed, it is perhaps unlikely that the South Dakota Supreme Court would choose not to follow the Eighth Circuit's decision in the future, on this federal law question. At all events, it is premature to assume that a conflict requiring resolution by this Court will be presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorneys

MAY 1980

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

United States of America,

Plaintiff,

vs.

Glen D. Dupris,

Defendant.

CR 77-30056-01

AMENDED MOTION AND ORDER TO DISMISS INFORMATION

Comes now the United States of America and moves the Court for an Order dismissing the Information in the above-entitled matter against the defendant Glen D. Dupris with prejudice on the grounds and for the reasons that nearly three years have elapsed since this suit was filed, significant items of evidence have been lost or misplaced during that time, witnesses' memories have faded in the interim, and, therefore, the interests of justice will be best served by dismissing said Information.

Assistant United States Attorney

O R D E R

Upon the foregoing Motion and for good cause showing, it is hereby

ORDERED that the Information in the above matter be and the same is hereby dismissed with prejudice as against the defendant Glen D. Dupris.

Dated this ____ day of _____, 1980.

BY THE COURT:

United States District Judge

ATTEST:

WILLIAM J. SRSTKA
Clerk

By_____
Deputy

(SEAL)